No. 10-180

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

MARLITA THOMAS, as mother, next friend and Special Administrator of the Estate of Norman L. Smith, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

DONALD J. PECHOUS
JEFFREY S. MCCUTCHAN
PAUL A. CASTIGLIONE*
ANDREW J. CREIGHTON
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840
paul.castiglione@cookcountyil.gov

ANITA ALVAREZ
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840

* *Counsel of Record*

Attorneys for Petitioner

233324

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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ARGUMENT

The "no duplication of damages instruction" given to the jury is, in essence, the foundation of the decision below affirming the jury verdict in this case. *See Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 311 (7th Cir. 2010) (recognizing that the district court instructed the jury against awarding duplicative compensatory damages and presuming that the jury followed that instruction). (Pet. App. 35a.) Relying on this instruction, the majority below affirmed the jury verdict.

Respondent characterizes the decision below as a "careful attempt to read the verdict in a consistent manner." (Res. Br. 3.) Just the opposite is true. Given the verdict form used in this case, the jury's intent is indecipherable and the foundation of the panel decision (*i.e.*, the "no duplication of damages" instruction) could not support the weight placed upon it. As Judge Sykes noted, "[t]he panel relies too heavily on the presumption that jurors follow their instructions — a presumption that is unwarranted given the circumstances, or at least cannot bear the weight the panel assigns to it." *Id.* at 319. (Pet. App. 55a.) Judge Sykes concluded that the court could not "safely rely on the presumption that jurors follow their instructions when the instructions are this muddled. . . we cannot know with any confidence exactly what the jury did." *Id.* at 318. (Pet. App. 53a.)[1]

1. Judge Sykes did note that her views on the bewildering hodgepodge of damage instructions were "not to suggest that better instructions would necessarily have cured the serious flaws in the verdict form." *Id.* (Pet. App. 53a.)

By presuming that the jury followed the "no duplication of damages instruction," the decision below effectively created a rule that the issuance of this instruction cures all other erroneous damage instructions and verdict forms, even those that specifically contradict the "no duplication" instruction. Respondent, however, contends that "[n]o reading of the decision from the court of appeals can find the rule that Petitioner claims was established and which now forms the basis of the petition." (Res. Br. 5, 6.) As both the panel decision and Judge Sykes' dissent recognize, the majority below held that the "no duplication of damages instruction" cured patent errors such as deciding damages prior to liability, assessing damages "by defendant" and "by claim" and aggregating individualized damage awards against multiple defendants for a single injury. *See Thomas*, 604 F.3d at 312. (Pet. App. 39a.) It is impossible to read the decision below and not see that the Seventh Circuit embraced this legal principle.

Of course, the Seventh Circuit did not say that it had adopted a *per se* rule regarding "no duplication of damages" instructions but that is exactly what it did. It does not matter whether the Seventh Circuit formally announced the imposition of a *per se* rule regarding the effect of "no duplication of damages instructions." What matters is that the decision below effectively created such a rule.

Nonetheless, Respondent argues that Petitioner cannot challenge this rule because it has waived any objections to the verdict form and jury instructions that Respondent proposed. (Res. Br 3-5.) This argument has

no factual or legal basis, as the record below shows that Petitioner made multiple objections to Respondent's proposed verdict form and jury instructions.

I. PETITIONER DID NOT WAIVE ANY OBJECTIONS TO RESPONDENT'S PROPOSED VERDICT FORM OR JURY INSTRUCTIONS.

The record below is replete with Petitioner's objections to Respondent's proposed verdict forms and jury instructions on damages. For example, during the parties' conference on jury instructions, the following colloquy between the district court, Andrew Creighton (the Petitioner's attorney), Daniel Gallagher (the attorney for former Sheriff Michael Sheahan and the individual deputy sheriffs) and Daniel Alexander (the attorney for Respondent) took place:

The Court:	I will use the plaintiff's verdict forms.
Mr. Creighton:	Just for the record, I object.
The Court:	Okay.
Mr. Creighton:	I think there's duplication on the damages. They're awarding damages for each of the counts.
Mr. Gallagher:	For each one, Judge.
Mr. Alexander:	There's an instruction on that.

Mr. Creighton: Right, they can only recover once for one injury, and they've got him recovering for *Monell*, they've got him recovering on —

The Court: Where's your instruction that covers duplication of damages? Because if not, we would have to take care of that post-verdict, which you are itemizing each claim, so I'll be able to do that.

(Transcript of Proceedings for December 7, 2007 in *Smith v. Cook County Sheriff's Dep't*, No. 04 C 3563 at 1797-1798, App. 2a-3a.) Petitioner's counsel objected to Respondent's proposed verdict form on the grounds that it provided for the award of damages by claim and for the duplication of damages for a single, indivisible injury in a constitutional tort claim.

Significantly, Respondent's counsel proposed to the district court that a "no duplication of damages instruction" would cure any potential error in her proposed verdict form. (App. 3a.) This approach, which the district court and panel below adopted, is the basis for the *per se* rule regarding "no duplication of damages instructions" that the Seventh Circuit effectively adopted and that Petitioner now challenges.

Respondent proposed a jury instruction — Plaintiff's instruction #38 — to address the issue of a duplicate damage award. (App. 15a-16a.) Judge Sykes

described this instruction as a "bewildering hodgepodge of instructions—some inapplicable, some simply wrong" and found that Plaintiff's instruction #38 "erased whatever effectiveness the no-duplication instruction might have had." *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a.) Petitioner filed a written objection to the proposed verdict form stating that this form "presumes that an award is warranted prior to a finding of liability and that liability should be determined after an award." (App. 12a.)[2]

In support of her claim that Petitioner has waived any objection it has to either the verdict form or jury instructions, Respondent contends that: (i) the verdict form that defendants submitted below was just as bad as Respondent's verdict form (Res. Br. 4), (ii) defendants below proposed the equivalent of Plaintiff's instruction #38 (Res. Br. 4) and (iii) to bolster the claim that the jury was invited to assess damages by defendant, Petitioner "attached a facsimile verdict form [to its petition] that appears to indicate that the jury was given separate lines to enter damages against the two defendants in the policy and practice claim (Res. Br. 1-2.) Petitioner will address these three arguments separately.

First, the verdict form that defendants below proposed was different than Respondent's verdict form.

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2. Both the majority below and Judge Sykes agree with Petitioner that damages should not have been decided prior to liability. *Compare Thomas*, 604 F.3d at 312-313 (Pet. App. 39a) with *Thomas*, 604 F.3d at 319, n. 3 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 55a.)

For example, defendants proposed the submission of special interrogatories asking the jury whether they found the individual defendants to have been deliberately indifferent to the decedent, Norman Smith. The district court declined to submit those interrogatories. Defendants' verdict form also asked the jury to consider liability before turning to damages.

It is true, as Judge Sykes observed, that the verdict form that defendants initially introduced below also had its flaws, particularly with regard to the determination of damages. *Thomas*, 604 F.3d at 315 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 46a.)

But it is also important to note that Petitioner objected to this very problem (*i.e.*, the verdict form would lead to duplicate damages because it asked the jury to determine damages by defendant and by claim) in the jury instruction conference. (App. 2a-3a.) Had the district court sustained the objection to the verdict form that Petitioner made at the jury instruction conference, the remedy would have been to draft a new verdict form that did not invite the jury to duplicate damages. As Judge Sykes concluded:

> [I]t's the judge's responsibility to get the verdict form right, not just pick one side's proposal or the other's. The judge should have rejected both proposals and written a proper verdict form himself or insisted that the lawyers go back to the drawing board. To adopt a seriously flawed verdict form and then tell the jury to disregard its structure is

> a careless way to charge a jury; it invites juror confusion.

Ibid. (Pet. App. 47a.)[3]

Second, Respondents' arguments regarding the damage instructions miss the mark. Appendix B to Respondents' Brief is a proposed instruction that was included in the Cook County Sheriff's proposed instructions. (App. 17a-19a.) The Sheriff's proposed instruction is a red herring for one simple reason: it was Respondent who argued that a "no duplication of damages instruction" would cure any problems with Respondents' proposed verdict form. The district court and the panel below agreed with Respondent. It was Petitioner who steadfastly objected that the verdict form — regardless of any adjoining instruction — would lead to the duplication of damages. (App. 2a-3a, 12a.)

Third, Petitioner did not, as Respondents contend, "attach a facsimile verdict form [to its petition] that appears to indicate that the jury was given separate lines to enter damages against the two defendants." (Pet. App. 95a.) Petitioner simply reproduced the filled out verdict form, including the jury's insertion of "Cook County – $3,000,000.00 Sheriff of Cook County –

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3. Even if Petitioner did not properly preserve its objection to Respondent's verdict form, the decision of the district court to use this form and the decision below affirming this district court constitute plain error under Federal Rule of Civil Procedure 51(d)(2). Plain error requires a showing that the error "affected the substantial rights of the appellant." *Ammons-Lewis v. Metropolitan Water Reclamation Dist* , 488 F.3d 739, 751 (7th Cir. 2007). The error in the verdict form here deprived Petitioner of its right to a fair trial.

$1,000,000.00" into the blank space for compensatory damages on the form for Plaintiff's federal policy and practice claim. Appendix A of Respondent's Brief contains a copy of the exact same verdict form. The jury, therefore, awarded damages by defendant, even though this portion of the verdict form did not ask them to do so. This only serves to illustrate that the verdict form and jury instructions, when viewed as a whole, directed the jury to award damages by defendant and by claim for a single, indivisible injury.

In sum, the jury duplicated damages and Petitioner objected to the verdict form on this very basis. Petitioner has not waived this objection.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUITS REGARDING THE DAMAGES AVAILABLE IN CONSTITUTIONAL TORT CLAIMS UNDER SECTION 1983 AND THE RULES AGAINST APPORTIONMENT OF DAMAGES AMONG JOINT TORTFEASORS FOR A SINGLE INJURY AND AGAINST AGGREGATION OF DAMAGE AWARDS AGAINST SUCH TORTFEASORS.

A. THE DECISION BELOW DID NOT CONSIDER THE JURY INSTRUCTIONS AS A WHOLE AND THUS CONFLICTS WITH DECISIONS FROM MULTIPLE CIRCUITS.

It is well established that courts view jury instructions as a whole when determining whether the instructions properly set forth the elements of Section

1983. *See Figueroa v. Alejandro*, 597 F.3d 423, 434 (1st Cir. 2010); *Wilson v. Morgan*, 477 F.3d 326, 341 (6th Cir. 2007); *Fleming v. Harris*, 39 F.3d 905, 907 (8th Cir. 1994); *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992); and *Street v. Parham*, 929 F.2d 537, 539 (10th Cir. 1991). Respondent argues that the holdings in these cases are non-controversial and that the decision below does not conflict with them. (Res. Br. 1-2, 8-10.) Judge Sykes, however, recognized the conflict, noting that "the panel omits any discussion of the instructions as **a whole . . .**" *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*) (emphasis added). (Pet. App. 53a.)

The decision below did not discuss the jury instructions as a whole and did not consider the full breadth of the different instructions within Plaintiff's instruction #38 (some of which, as Judge Sykes noted, were wrong and some irrelevant) on the "no duplication of damages" instruction within Plaintiff's instruction #38. *Id.*

In viewing the "no duplication of damages" instruction in isolation from the other jury instructions and the verdict form, the decision below parted ways from the decisions of the First, Sixth, Eighth, Ninth and Tenth Circuits set forth above.

B. THE DECISION BELOW CONFLICTS WITH DECISIONS PROHIBITING THE APPORTIONMENT OF DAMAGE AWARDS AGAINST MULTIPLE DEFENDANTS FOR A SINGLE, INDIVISBLE INJURY AND THE AGGREGATION OF SUCH AWARDS INTO A SINGLE JUDGMENT.

1. Damages For A Single, Indivisible Injury Cannot Be Apportioned Among Joint Tortfeasors.

Respondent argues that the jury was authorized to apportion damages among defendants who, under Respondent's theory of the case, were jointly liable for a single, indivisible injury. (Res. Br. 10-11.) A jury, however, cannot apportion damages among joint tortfeasors for a single indivisible injury. *See Patrick v. City of Detroit*, 906 F.2d 1108, 1114-16 (6th Cir. 1990). That is exactly what the jury did here. Respondent ridiculed this argument as being based on "an abstract `law of damages'." (Res. Br. 10-11.)

The prohibition on apportioning damage awards among joint tortfeasors in a constitutional tort claim for a single, indivisible injury is anything but abstract. *See, e.g., Patrick*, 906 F.2d at 1116 (finding that the verdict form in a Section 1983 case was proper because it did "not make an allowance for apportionment" and "apportionment is improper when only joint and several liability is to be considered"). *See also Bell v. Mickelsen*, 710 F.2d 611, 619 (10th Cir. 1983) (holding that a jury improperly apportioned a $10,000 damage award among two defendants because it is improper to apportion damages for a single injury among defendants who are jointly and severally liable).

Respondent, however, argues that damages were not apportioned here because Petitioner is liable for the entire sum of damages awarded. (Res. Br. 11.) This argument surely begs the question. The jury entered different awards against different defendants. It is, as Judge Sykes found, impossible to know what the jury intended to do. *Thomas*, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a.)

In any event, the decision below cannot be reconciled with decisions from the Sixth and Tenth Circuits holding that damages cannot be apportioned among joint tortfeasors for a single, indivisible injury. In *Cleavinger v. Saxner*, 474 U.S. 193, 198 (1985), this Court affirmed a jury verdict which apportioned compensatory damages amongst members of prison disciplinary committee who were held liable for violating prisoners' due process rights but the issue of apportionment was neither raised nor discussed. This case provides an opportunity to address an issue not raised in *Cleavinger* and bring clarity to this point of law.

2. Courts Cannot Aggregate Separate Damage Awards Against Multiple Joint Tortfeasors For A Single, Indivisible Injury Into A Single Judgment.

Prior to the present case, the Seventh Circuit found that a district court may not ask a jury to award damages "by defendant" in a single injury Section 1983 claim and then aggregate the different awards into a single judgment. *See Watts v. Laurent*, 774 F.2d 168 (7th Cir. 1985).

Respondent attempts to distinguish *Watts* on the grounds that the court here gave a "no duplication of damage" instruction. (Res. Br. at 8.) However, that instruction, as Judge Sykes recognized, only exacerbated the problems in the verdict form regarding the determination of damages. Judge Sykes noted that the material similarity between *Watts* and the present case is this:

> The jury was improperly invited to award damages "by defendant" in a single-injury joint-liability case, and the question on appeal was whether the resulting separate damages awards may properly be aggregated. *Watts* answered this question "no" — aggregation is *not* appropriate in this situation. Here, the error is even worse because the jury was invited to award damages "by defendant" *and* "by claim" — and was given unintelligible instructions to boot. Aggregation is no more appropriate here than it was in *Watts*.

Thomas, 604 F.3d at 318 (Sykes, J., dissenting in part from the denial of rehearing *en banc*). (Pet. App. 53a-54a.) The decision below cannot be reconciled with *Watts*.

C. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT IN *CAREY* AND *STACHURA* REGARDING THE LAW OF DAMAGES IN SECTION 1983 CASES.

Respondent claims that *Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) are wholly irrelevant and pass the decision below "like ships in the night." (Res. Br. 9.) Respondent is mistaken.

Respondent admits that under *Carey* and *Stachura*, in the absence of actual proof, a plaintiff in a Section 1983 action cannot obtain compensatory damages. (Res. Br. 9.) The decision below cannot be reconciled with *Carey* and *Stachura*, as the Seventh Circuit affirmed a judgment by aggregating separate damage awards against multiple defendants for a single injury into a single judgment. Because this judgment was not based upon a single determination of damages, Respondent received duplicate damages and thus received compensation beyond what damages were actually proved. Such a result cannot be reconciled with *Carey* and *Stachura*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PATRICK T. DRISCOLL, JR.
Deputy State's Attorney
Chief, Civil Actions Bureau

DONALD J. PECHOUS
JEFFREY S. MCCUTCHAN
PAUL A. CASTIGLIONE*
ANDREW J. CREIGHTON
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840
paul.castiglione@cookcountyil.gov

ANITA ALVAREZ
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-1840

* *Counsel of Record*

Attorneys for Petitioner

APPENDIX

APPENDIX A — TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE RUBEN CASTILLO, AND A JURY DATED DECEMBER 10, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 04 C 3563
Chicago, Illinois
December 10, 2007
9:33 a.m.

MARLITA THOMAS, as Mother, Next Friend, and Special Administrator of NORMAN L. SMITH, JR., deceased,

Plaintiff,

-vs-

COOK COUNTY SHERIFF, et al.,

Defendants.

VOLUME 8
TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE RUBEN CASTILLO, AND A JURY

EXCERPTS OF JURY INSTRUCTION CONFERENCE

We then go to your verdict form. It's guilty or not guilty as to the eight defendants, right?

MR. GALLAGHER: Yes, sir.

THE COURT: And then it goes through the different claims --

MR. GALLAGHER: Yes, sir.

THE COURT: -- and awards damages.

MR. GALLAGHER: Yes, sir, which I think is the more appropriate way to do it because if there's no finding of liability, there's no finding of damages.

MR. ALEXANDER: For one thing, guilty implies a criminal burden of proof. They don't need to find them guilty.

MR. GALLAGHER: That's what's on all verdict forms.

MR. ALEXANDER: They need to find them liable.

THE COURT: I will use the plaintiff's verdict forms.

MR. CREIGHTON: Just for the record, I object.

THE COURT: Okay.

MR. CREIGHTON: I think there's duplication on the damages, They're awarding damages for each of the counts.

MR. GALLAGHER: For each one, Judge.

MR. ALEXANDER: There's an instruction on that.

MR. CREIGHTON: Right, they can only recover once for one injury, and they've got him recovering for Monell, they've got him recovering on --

THE COURT: Where's your instruction that covers duplicative damages? Because if not, we would have to take care of that post-verdict, which you are itemizing each claim, so I'll be able to do that.

MR. ALEXANDER: Well, we do -- I thought we had an instruction, your Honor. I thought it was one of the agreed, but I'm looking for it.

THE COURT: Well, you can take a look at that, and I'll look at it. We don't have to resolve it today, but we will resolve it before I instruct the jury. So just make sure we have an instruction.

MR. ALEXANDER: Need no duplication of damages.

THE COURT: Yes, go ahead.

MR. KOWALCZYK: Not waiving our objection to the Monell or any of the other verdict forms of plaintiff's, but I wanted to point out that No. 3, which should be modified to say "as to Cook County" just as your Honor modified that Monell.

MR. GALLAGHER: On one of those.

THE COURT: Okay. Yeah, I think that should be done.

MR. ALEXANDER: I'm sorry, let me get that.

THE COURT: This is on your verdict form as to Monell.

MR. ALEXANDER: Right. I'm looking.

APPENDIX B — DEFENDANTS' JOINT OBJECTIONS TO JURY INSTRUCTIONS, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, as Mother, Next Friend, and Special Administrator of NORMAN L. SMITH, JR., deceased,

Plaintiff,

v.

SHRIEFF OF COOK COUNTY, COOK COUNTY, et al.

Defendants.

Judge Ruben Castillo

DEFENDANTS' JOINT OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

NOW COME Defendants, SHERIFF OF COOK COUNTY, THOMAS DART, OFFICER ALEX SANCHEZ, OFFICER DONETTA DAVIS, OFFICER TERRENCE TOOMEY, OFFICER DOUGLAS JOHNSON, OFFICER LOUIS THIEMECKE,

Appendix B

OFFICER DARRYL HOUSTON, OFFICER JESUS FACUNDO, PEGGY WESTBOOK and COOK COUNTY, (hereinafter referred to collectively as "the Defendants"), by and through their attorneys, Daniel F. Gallagher, Larry S. Kowalczyk, Dominick L. Lanzito, QUERREY & HARROW, LTD., Assistant State's Attorney Andrew Creighton, Assistant State's Attorney Edward Maloney, and the COOK COUNTY STATE'S ATTORNEY'S OFFICE, and for their objections to Plaintiff's Proposed Jury Instructions, states as follows:

Jury Ins. No. 1 – Leaves out a substantial portion of Circuit pattern instruction 3.1. Leaves out a necessary portion of credibility assessment and the convictions of the witnesses.

Jury Ins. No. 2 – No objection. Although it from the 7th Circuit Pattern Instructions Defendant would submit 5th Circuit Instruction 2.18 in lieu of Plaintiff's Instruction No. 2.

Jury Ins. No. 3 – No objection.

Jury Ins. No. 4 – No objection.

Jury Ins. No. 5 – Would choose to use Jury Instruction 2.16. In addition, that should be supplemented Defendant's 15, which is 5th Circuit model jury instruction 2.17. This instruction discusses the credibility of a witness, including felony convictions.

Appendix B

Jury Ins. No. 6 – No objection, but would submit Defendant's No. 17.

Jury Ins. No. 7 – No objection. Redundant of Plaintiff's prior instruction No. 5.

Jury Ins. No. 8 – No objection. Redundant to the 5th Circuit model instruction.

Jury Ins. No. 9 – Objection. Defendant, Sheriff of Cook County and Defendant Correctional Officers at no time possessed the CMT Daily Contact Sheet for April 29th; therefore the implication that the Cook County Sheriff's Office and the Cook County Sheriff's Defendant's intentionally destroyed any evidence is a material misrepresentation, and should not be presented to the jury.

Jury Ins. No. 10 – No Objection.

Jury Ins. No. 11 – Objection. Plaintiff's estate also consists of Norman Smith's wife. Under Illinois Law and Wrongful Death Act and the Survival Act she is entitled to take as a part of the estate because she is Norman's wife. Therefore, No. 11 is incomplete and thus, objectionable.

Jury Ins. No. 12 – Objection. Although it is 7th Circuit model, 7.12 as modified plaintiff has deleted No. 4 which states "defendants acted under the color of law which is necessary for a civil rights lawsuit."

Appendix B

Jury Ins. No. 13 – No objection. Consistent with Defendants Instruction No. 24.

Jury Ins. No. 14 – No objection to the first paragraph. However, Defendant's object to the second portion as it is not part of the 7th Circuit Pattern Instruction. Specifically, Plaintiff inserts actual knowledge of a substantial risk of serious harm can be inferred from the obviousness of the risk, and Defendant's move to strike this based on the pattern instruction. In addition Defendant's would object that there is no proximate cause instruction for Count I.

Jury Ins. No. 15 – Objection. As Paragraph 3 states the Cook County Sheriff had a practice of failing to timely fix broken video monitors in the Cook County Jail. According to this court's ruling on Summary Judgment, this was a policy issue to be addressed specifically by the County of Cook. In addition, No. 2 says the Cook County or Cook County Sheriff of a practice of severely understaffing correctional officers, which is also a misstatement of this court's ruling on Summary Judgment. Therefore, based on those inconsistencies with this court's prior rulings, Defendant's would object to Instruction No. 15.

Jury Ins. No. 16 – Objection. This instruction is not consistent with this court's ruling on Summary Judgment.

Jury Ins. No. 17 – Objection. Paragraph No. 2 is inserted by the plaintiff and is not in accordance with

the Pattern Instruction and we would instruct the court to utilize Defendant's Instruction No. 28.

Jury Ins. No. 19 – No objection based on this Court's rulings on Plaintiff's Motion in Limine.

Jury Ins. No. 20 – No objection. Consistent with Defendants' Jury Ins. No. 35.

Jury Ins. No. 21 – Objection. This instruction should be supplemented with Defendants' Proposed Jury Instruction No. 36, from the 7th Circuit. In addition it fails to mention anything about punitive damages. Plaintiff's Instruction No. 21 also contains language related to individuals that are alive including physical pain and suffering, including physical disability impairment and inconvenience the effect of the plaintiff's injuries and inconvenience of the normal pursuits of pleasure of life, mental anguish and feelings of economic insecurity caused by disability. Loss of income in the past, impairment of earnings and abilities in the future; including a payment of normal progress to plaintiffs due to his physical condition, and post medical expenses. Based on the facts of this case this is an inappropriate instruction.

Jury Ins. No. 22 – Objection. There is no pre-existing condition of meningitis that is noted here or any condition which has been adduced that renders Norman Smith more susceptible to that injury and thus is improper.

Appendix B

Jury Ins. No. 23 – Objection. Based on the fact that this is a collateral source Jury Instruction and at this point and time there is no evidence of a collateral source paying Norman Smith for anything, thus the instruction is improper.

Jury Ins. No. 24 – Objection.

Jury Ins. No. 25 – Objection.

Jury Ins. No. 26 – Objection. Based on the fact that Plaintiff's Instruction No. 26 in that there is no Respondent superior allegation for Counts IV and V alleged in Plaintiff's Fifth Amended Complaint; therefore the County and the Sheriff's Office cannot be held liable under a theory respondent superior for Counts IV and V.

Jury Ins. No. 27 – Objection.

Jury Ins. No. 29 – No objection other than it should be specific to the Counts to which it applies. In addition there is no proximate cause definition for estate claims.

Jury Ins. No. 30 – Objection. Recommend Defendants' Proposed Instruction No. 37 which follows the language of the Illinois Pattern Instruction No. 31.05. Plaintiff's Instruction doesn't mention the current wife who is entitled to take under the Illinois Intestacy Statutes. In addition it also eliminates what instruction, moral training and other superintendents of education

defendant might have reasonably expected to give to his children had he lived. Therefore, Instruction No. 37 should be used in lieu of Plaintiff's Instruction No. 30.

Jury Ins. No. 31 – Objection. There has been no evidence introduced in this case of loss of society or a relationship between all of the children and Norman Smith.

Jury Ins. No. 31 – No objection. No objection to Pattern Instruction 14.01.

Jury Ins. No. 32 – Objection. There has been no evidence of loss of income or expected future earnings adduced during discovery in this matter.

Jury Ins. No. 33 – Objection. This court has ruled that there has been no evidence of Norman Smith's occupation and Defendants are barred from going into Norman Smith's habits and other activities that are part of his lifestyle. Therefore, the Instruction is improper.

Jury Ins. No. 34 – Objection. Submit Defendants Instruction No. 31 in lieu of the same.

Jury Ins. No. 35 – Objection. Hedonic damages are not recoverable.

Jury Ins. No. 36 – Objection. It's not an Illinois Pattern Instruction or a 7th Circuit Pattern Instruction.

Appendix B

Jury Ins. No. 37 – Objection. It is not based on Illinois Pattern Instruction 34.01, 30.04.02, 30.05, 30.05.01 or 31.1.

Jury Ins. No. 38 – Objection. Defendants submit their Jury Instruction No. 38 which is based on 7th Circuit Model Jury Instruction No. 7.24. Plaintiff submitted to 15.14. The 5th Circuit Model Jury Instruction more accurately reflected in Defendants Jury Ins. No. 39. In addition, Defendants believe their Instruction No. 40 for mitigation should be also included.

Lastly, plaintiff's Verdict Forms are improper for two reasons: First, it presumes that an award is warranted prior to a finding of liability and that liability should be determined after an award.

Second, it is inappropriately suggestive that an award must be made in this matter regardless of whether there is a finding of liability. Specifically, each verdict form says Plaintiff is awarded $ and then a space for to fill in compensatory damages. Only in parenthesis it says "if you find against the plaintiff on her particular claim fill in the number zero." This instruction is overly presumptive and overly suggesting, therefore these verdict forms should he allowed. Lastly, there should be a signature for each jury member for each particular jury verdict form.

Appendix B

Respectfully submitted,

SHERIFF OF COOK COUNTY, et al. - Defendants.

By: /s/
Daniel F. Gallagher
One of their attorneys

Daniel F. Gallagher, Esq.
Larry S. Kowalczyk, Esq.
Dominick L. Lanzito, Esq.
QUERREY & HARROW, LTD.
175 West Jackson, Suite 1600
Chicago, Illinois 60604

APPENDIX C — PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

A LAW OFFICE OF CHRISTOPHER R. SMITH

CHRISTOPHER R. SMITH
JARED S. KOSOGLAD
ATTORNEYS

119 NORTH PEORIA STREET, SUITE 3A
CHICAGO, ILLINOIS 60607

PHONE (312) 432-0400
FAX (312) 850-2704

November 23, 2007

BY FAX:

ASA Andrew Creighton
301 Richard J. Daley Center
Chicago, IL 60602
Fax: 312-603-3600

Daniel Gallagher, Terrence Guolee,
Larry Kowalczyk
Querey & Harrow, Ltd.
175 West Jackson, Suite 1600
Chicago, IL 60604
Fax: 312-540-0578

Re: 1:04-cv-03563 Smith v. Cook Co Sheriff, et al

Dear Counsel:

Attached please find plaintiff's proposed voir dire and jury instructions. We are sorry that you could not call us back to schedule an instruction conference. We will be working all weekend if you care to meet and discuss jury instructions or any trial issues

Very Truly Yours,

Chris Smith

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, et. al,

Plaintiffs,

v.

SHERIFF OF COOK COUNTY, et. al.,

Defendants.

Judge Castillo

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

* * *

You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all of his injuries.

Appendix C

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are multiple Defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable , without determining individual percentages of liability.

* * * *

Plaintiff's Instruction No. 38

APPENDIX D — COOK COUNTY SHERIFF'S PROPOSED JURY INSTRUCTIONS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 04 C 3563

MARLITA THOMAS, et al.,

Plaintiffs,

v.

SHERIFF OF COOK COUNTY, et al.,

Defendants.

Judge Castillo

COOK COUNTY SHERIFF'S PROPOSED JURY INSTRUCTIONS

You must not award compensatory damages more than once for the same injury. For example, if the plaintiff prevails on two claims and establishes a dollar amount for his injuries, you must not award him any additional compensatory damages on each claim. The plaintiff is only entitled to be made whole once, and may not recover more than he has lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the plaintiff fully for all of his injuries.

Appendix D

With respect to punitive damages, you may make separate awards as to each Individual Defendant on each claim that plaintiff has established. There can be no punitive damages assessed on plaintiff's *Monell* Policy Claims against Cook County and the Cook County Sheriff's Office or plaintiff's state wrongful death and survival claims.

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are multiple Individual Defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration of his case without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages, except for the purposes of punitive damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without determining individual percentages of liability.

Appendix D

Defendants' Instruction No. 39

Fifth Circuit of Model Jury Instructions-Civil 15.14 as Modified

___Accepted
___Rejected
___Modified